No. 82-945

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

SURE-TAN, INC. and SURAK LEATHER COMPANY,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MOTION FOR LEAVE TO FILE AND BRIEF OF THE ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND AND THE ASIAN LAW CAUCUS AS *AMICI CURIAE*

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IN THE
SUPREME COURT OF THE UNITED STATES

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No. 82-945

SURE-TAN, INC. and SURAK LEATHER COMPANY,

Petitioners,

-against-

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit

MOTION OF THE ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND AND THE ASIAN LAW CAUCUS FOR LEAVE TO FILE BRIEF AMICI CURIAE

The Asian American Legal Defense and Education Fund and the Asian Law Caucus respectfully move, pursuant to Rule 42 of this Court's rules, to file a brief as amici curiae. Counsel for the respondent has consented to the filing of this brief; Sure-Tan, Inc. refused our request for

consent.*

The Asian American Legal Defense and Education Fund is a national organization of attorneys, law students and legal workers committed to protecting the civil rights of Asian Americans through litigation and community education.

The Asian Law Caucus is a non-profit organization formed to protect the rights of Asian Americans in employment, housing, immigration, government benefits and criminal justice by providing legal and educational services.

The issues in this case have broad significance for the Asian American community. Amici are particularly concerned

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* Copies of the letters from counsel for the respondent and counsel for Sure-Tan, Inc. are being lodged with the Clerk.

that the National Labor Relations Act continues to protect undocumented workers. Such protection is necessary for undocumented workers as well as documented workers to assert their rights to organize. Moreover, the exclusion of undocumented workers from the Labor Act's protection will adversely impact on Asian American communities.

Since the ramifications of these issues extend beyond the particular case before the Court, we seek the opportunity to present our views on this matter and respectfully move for leave to file this brief.

Respectfully submitted,

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August 12, 1983

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1983

No. 82-945

SURE-TAN, INC. and SURAK LEATHER COMPANY,

Petitioners,

-against-

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On Writ of Certiorari to the
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BRIEF OF THE ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND AND THE ASIAN LAW CAUCUS AS AMICI CURIAE

INTEREST OF AMICI

The Asian American Legal Defense and Education Fund, Inc. (AALDEF), is a non-profit corporation established in 1974 under the laws of the State of California

and New York. It was formed to protect the civil rights of Asian Americans throughout the nation through the prosecution of lawsuits and the dissemination of public information.

The Asian Law Caucus, Inc., is a nonprofit corporation established under the laws of the State of California in 1972. It was formed to assist Asian Americans in the Greater San Francisco Bay Area in the protection of their rights in employment, housing, immigration, governmental benefits and criminal justice by providing legal and educational services.

In the last fifteen years, Asian immigration to the United States has dramatically increased. While Asians now comprise one-third of the legal immigra-

tion to this country,[1] a number of Asians reside as undocumented aliens. Amici's experience has shown that Asian undocumented aliens suffer from the most extreme forms of exploitation in all aspects of their daily lives, which merely compounds the burdens of race and national origin discrimination that continue to disadvantage Asian Americans in general. Because undocumented workers are particularly vulnerable to exploitation, amici view with great concern any decision which would further strip these workers of their rights to seek legal redress.

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1. See Pian, Consultation Focus: Identification of Issues, in Civil Rights Issues of Asian and Pacific Americans: Myths and Realities 11 (1979) (hereinafter "Civil Rights Issues"), citing Annual Reports of the Immigration and Naturalization Service.

STATEMENT OF THE CASE

Petitioners Sure-Tan, Inc. and Surak Leather Company ("Sure-Tan") are two small leather processing and sales firms located in Chicago, Illinois. Both firms are operated by Steve and John Surak. They employed eleven Mexican workers, most of whom had no visas or work permits. A union organizing drive began at Sure-Tan in July, 1976, and eight employees signed cards authorizing the Chicago Leather Workers Union, Local 431, Amalgamated Meatcutters and Butcher Workers of North America (the "union") to act as their collective bargaining representative.

The day following the union's certification, John Surak wrote the Immigration and Naturalization Service ("INS") and asked it to investigate the status of several employees. On February 18, 1977,

INS agents visited the company's plants, found that five employees were illegally in the United States, and arrested them. The employees chose not to be deported and voluntarily departed from the country.

The National Labor Relations Board (the "Board") found that the petitioners violated sections 8(a)(1) and (3) of the National Labor Relations Act ("NLRA" or "Labor Act") by requesting the INS investigation, since it led to the departures of five employees solely because they supported the union. Sure-Tan, Inc., 234 N.L.R.B. 1187, 1187 (1978). The Board recognized that aliens are "employees" under section 2(3), 29 U.S.C. § 152(3), and therefore protected under the Act. The Board also found that the employees' forced departures constituted "constructive discharges" by Sure-Tan. Id. To remedy the unlawful con-

structive discharges, the Board ordered the usual remedies of reinstatement and backpay. Id. at 1187-88.

The court of appeals upheld the Board's findings of unfair labor practices and agreed that the petitioners had constructively discharged the employees. N.L.R.B. v. Sure-Tan, Inc., 672 F.2d 592, 602 (7th Cir. 1982). It modified the Board's order to require petitioners to reinstate the discriminatees only if they were "legally present and legally free to be employed in this country when they offered themselves for reinstatement." Id. at 606. The court also modified the Board's order to make clear "(1) that . . . in computing backpay discriminatees will be deemed unavailable for work during any period when not lawfully entitled to be present and employed in the United States

and (2) that backpay need not be placed in escrow for more than one year." Id. However, because it was possible that the discriminatees would not be lawfully available for employment in the United States prior to the date of the new offers of reinstatement, and thus would receive no backpay, the court ordered that employees should receive a minimum of six months' backpay. Id. The court found six months to be a reasonable estimate of the minimum time during which the discriminatees might reasonably have remained employed without apprehension by the INS, but for the employers' unfair labor practice. Id.

A petition for a writ of certiorari was granted by this Court on March 7, 1983.

SUMMARY OF ARGUMENT

There is no inherent conflict between the general policies of the NLRA and the Immigration and Nationality Act ("INA") by extending labor law protection to undocumented workers. The exclusion of undocumented workers from NLRA protection will undermine the purposes of the NLRA by giving employers a new weapon to decertify validly elected unions or to break lawful union strikes. Thus, extending Labor Act coverage to undocumented workers is essential to protect the efforts of American citizens and legal resident aliens to exercise their NLRA rights. Moreover, NLRA protection of undocumented workers serves the policy of the INA by removing the incentives which encourage employers to prefer undocumented aliens over other workers.

Exclusion of undocumented aliens from

NLRA protection will have a chilling effect on the growing labor movement in Asian American communities. Due to language and cultural barriers, Asian workers are often unaware of their legal rights at the workplace. By stripping undocumented aliens of their protection under federal labor laws, Asian workers, both citizens and legal resident aliens, may be deterred from exercising their rights to organize and join unions.

ARGUMENT

I. LABOR LAW PROTECTION OF UNDOCUMENTED WORKERS IS CONSISTENT WITH THE GOALS AND PURPOSES OF THE NATIONAL LABOR RELATIONS ACT, AND SUCH PROTECTION OF UNDOCUMENTED ALIENS DOES NOT CONFLICT WITH THE IMMIGRATION AND NATIONALITY ACT.

Whether or not the NLRA, by its own terms, protects undocumented workers

depends on the definition of "employee," because the NLRA protects only "employees" from "unfair labor practices."[2] Under the definition of employees, undocumented workers are not categorically excluded from coverage.[3] Since the term "employee"

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2. National Labor Relations Act § 2(3), 29 U.S.C. § 152(3) (1976).

3. The section reads in pertinent part:

> The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with any current labor dispute, or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment but shall not include any individual employed as an agricultural laborer, or in the domestic service to any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status

(footnote continued on next page)

is defined by listing specific exclusions, and undocumented workers are not categorically excluded, undocumented aliens can be inferred to be included in the Act. Additionally, there is nothing in the legislative history of the Labor Act to suggest that undocumented workers were meant to be excluded. In sparse discussions over the definition of employee, it was said that "employee" was meant to include anyone who is on the "pay-roll."[4/]

(footnote continued from previous page)

> of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act . . . or by any other person who is not an employer as herein defined.

National Labor Relations Act § 2(3), 29 U.S.C. § 152(3)(1976) (incorporating amendments of Labor Management Relations Act, 1947, ch. 120, § 101, 61 Stat. 136).

4. 79 Cong. Rec. 9686 (1935) (remarks of Rep. Taylor and Rep. Connery, Chairman of the Committee on Labor).

Since there is no indication that Congress intended to exclude undocumented workers from the definition of employee, they should be given employee status if such coverage is consistent with the purposes of the NLRA.

A. Exclusion of Undocumented Workers from the Coverage of the National Labor Relations Act Would Undermine the Purposes of the Act.

The purposes of the NLRA are to engender industrial harmony by facilitating collective bargaining and to equalize the bargaining power between employees and employers.[5/] These goals have been recognized by this Court:

> The enactment of the NLRA in 1935 marked a fundamental change in the Nation's labor policies. Congress expressly

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5. S. Rep. No. 573, 74 Cong., 1st Sess. 1-3 (1935); see National Labor Relations Act § 1, 29 U.S.C. § 151 (1976) (Findings and Declaration of Policy).

> recognized that collective organization of segments of the labor force into bargaining units capable of exercising economic power comparable to that possessed by employers may produce benefits for the entire economy in the form of higher wages, job security, and improved working conditions.

Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters, 436 U.S. 180, 190 (1978). Excluding undocumented workers from the Labor Act's definition of "employee" would hinder the exercise of rights by citizens and properly documented alien employees,[6/] thereby "undermin[ing] Congress's objectives in enacting the NLRA."[7/]

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6. Case Comment, Illegal Aliens as "Employees" under the National Labor Relations Act, 68 Geo. L.J. 851, 863 (1980).

7. Note, Retaliatory Reporting of Illegal Alien Employees: Remedying the Labor-Immigration Conflict, 80 Colum. L. Rev. 1296, 1298 (1980).

This interference manifests itself in many contexts. For example, the denial of employee status to undocumented workers would disrupt the representative union election process, particularly in those industries where a large number of undocumented aliens are employed. Since undocumented workers are virtually indistinguishable from undocumented workers, undocumented workers will inevitably participate in these representative elections. Thus, if undocumented workers are excluded from the Act, the losing party--either the employer or the prospective union--would seek to invalidate the election results and would most likely succeed.

A concrete example of this danger was provided in N.L.R.B. v. Sure-Tan, Inc., 583 F.2d 355 (7th Cir. 1978). Six of the seven voting employees were undocumented

workers. Without the support of those six, the single worker legally within the United States would be powerless. As the Sure-Tan court indicated, invalidating representation elections because undocumented workers participated in the election would give employers a new weapon with which to disrupt union organizing efforts. Id. at 360.

Moreover, exclusion of employee status to undocumented workers would significantly shift the balance of bargaining power to the employer. In workplaces where significant numbers of undocumented workers are employed, the availability of sufficient non-unionizable workers would eliminate the power of the strike in the bargaining process. Employers could freely coerce undocumented workers and prevent them from participating in lawful strike actions, thus insulating themselves from the

potential threat of a strike. To the extent that the union's power in bargaining is dependent on speaking as a collective voice for all those in the workplace, the exclusion of undocumented workers would serve to diminish the union's strength and make it more difficult for the union to bargain for higher wages, better working conditions and job security. The extension of employee status to undocumented workers, thereby giving them protection under the NLRA, is essential to protect the efforts of American citizens and properly documented alien workers to exercise their NLRA rights. Thus, NLRA protection of undocumented workers is consistent with the Act's goals of achieving industrial peace by facilitating collective bargaining and reducing the disparity in bargaining power between workers and employers.

B. The Extension of Employee Status to Undocumented Workers Does Not Conflict With the Underlying Policies of the Immigration and Nationality Act.

Although NLRA protection of undocumented workers is fully consistent with the goals and purposes of the NLRA, such protection should not directly conflict with the clear proscription found in other federal statutes. Southern Steamship Co. v. N.L.R.B., 316 U.S. 31, 47 (1942). "Frequently, the entire scope of congressional purpose calls for careful accommodation of one statutory scheme to another." Id. at 47.

It has been argued that such protection of undocumented workers directly conflicts with U.S. immigration policy as embodied in the Immigration and Nationality

Act.[8/] Objections against including undocumented workers as "employees" are not based on conflict with any specific immigration provision. Rather the objection is based on a more generalized notion that the intent of the INA is not to bestow benefits and protections to a class of workers who entered the United States illegally or who worked without authorization. Thus, it has been argued that when the NLRA is read alongside the INA, the NLRA should be interpreted to exclude undocumented workers from its protection. However, upon closer examination of the policies of both the NLRA and the INA, "the conflict between the two acts is more

8. Apollo Tire, Inc. argued in N.L.R.B. v. Apollo Tire Co., Inc., 604 F.2d 1180, 1182 (9th Cir. 1979) that "Congress, mindful of a restrictive immigration policy when it enacted the NLRA to govern relations between management and employees, intended to exclude aliens working without proper authority in the United States from the coverage of the Act."

theoretical than real."[9/]

One of the primary purposes behind the enactment of the INA was to protect domestic labor markets from the harmful effects of massive and uncontrolled influxes of foreign nationals.[10/] Section 212(a)(14) specifically provides for the exclusion of aliens if the Secretary of Labor has determined that there are sufficient available American workers who

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9. Case Comment, supra note 6, at 864.

10. This was declared to be one of the "great purposes" of the immigration acts. Karnuth v. United States, 279 U.S. 231, 243 (1929). See also H.R. Rep. No. 1365, 82nd Cong., 2d Sess. (1952), reprinted in 1952 U.S. Code Cong. & Ad. News 1653, 1705. ("It is the opinion of the Committee that this provision will adequately provide for the protection of American labor against an influx of aliens entering the United States for the purpose of performing skilled or unskilled labor where the economy of the individual localities is not capable of absorbing them at the time they desire to enter this country.")

are able, willing and qualified to perform such skilled or unskilled labor and that the employment of such aliens will adversely affect the wages and working conditions of workers in the U.S. similarly employed.[11]

However, labor law protection of undocumented aliens conflicts neither with the INA nor with its underlying policy of protecting American labor. In fact, such protection furthers the policies of the INA.[12] Because the wages of unionized workers are higher, employers often hire

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11. Immigration and Nationality Act § 212 (a)(14), 8 U.S.C. § 1182(a)(14) (1976); Peskioff v. Secretary of Labor, 501 F.2d 757, 761 (D.C. Cir.), cert. denied, 419 U.S. 1038 (1974) (alien has the burden of proving no adverse effect on wages and working conditions of American citizens).

12. See generally Kutchins & Tweedy, No Two Ways About It: Employer Sanctions Versus Labor Law Protections for Undocumented Workers, 5 Indus. Rel. L.J. 247 (1982); see Note, supra, note 7, at 1922; see Case Comment, supra note 6, at 865.

undocumented workers who cannot organize themselves. "By insuring that undocumented workers are not more attractive to potential employers than legal resident workers, labor law protection suppresses demand for alien workers."[13/] The more undocumented workers are treated like the other workers, the less impetus employers will have to hire undocumented workers. Therefore, NLRA protection of undocumented aliens actually favors citizens and legal aliens in the domestic workforce, and thus, such protection best furthers the policies underlying the immigration laws.

The circuit courts which have addressed this important issue have consistently and persuasively argued that upholding labor

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13. Note, supra note 7, at 1299.

law protection for undocumented workers will further immigration policy. In N.L.R.B. v. Sure-Tan, Inc. ("Sure-Tan I"), the court held that certification based on votes by six undocumented workers did not conflict with federal immigration laws, particularly 8 U.S.C. § 1182(a)(14). 583 F.2d 355 (7th Cir. 1978). Sure-Tan I arose from the same events which led to the present case. After Sure-Tan called the INS to deport the six undocumented workers who had voted for the union, the company sought to invalidate the election on the grounds that six of the seven voters were undocumented workers.

The court flatly rejected the company's argument that certification improperly conflicted with federal immigration laws. Id. at 359. After analyzing how the policies underlying the immigration laws

could best be advanced in such circumstances, the court concluded:

> declining to certify this Union could only have the effect of encouraging violations of the immigration laws . . . If a company can avoid certification merely by hiring aliens, undoubtedly some companies will choose to hire such aliens in order to gain immunity from labor unions . . . Thus by refusing to certify unions with a majority of alien members we would be giving employers an extra incentive to hire aliens and thus would be defeating the goals of the immigration laws." Id. at 360.

Similarly, the Ninth Circuit, in N.L.R.B. v. Apollo Tire Co., Inc., 604 F.2d 1180 (9th Cir. 1979) held that the NLRB properly ordered reinstatement of employees who had been laid off in violation of the NLRA, even though these employees were undocumented workers. The court rejected the company's argument that the Board's order improperly conflicted

with the spirit of a restrictive immigration policy and concluded to the contrary:

> Were we to hold the NLRA inapplicable to illegal aliens, employers would be encouraged to hire such persons in hope of circumventing the labor laws. The result would be more work for illegal aliens and violations of the immigration laws would be encouraged.

Id. at 1183.

In conclusion, there is no inherent conflict between the general policies of the NLRA and the INA. Neither the general policy of the INA nor any of its specific provisions are violated by granting undocumented workers "employee" status and its consequent NLRA protection. To the contrary, the exclusion of undocumented aliens from the NLRA's definition of "employee" would undermine policies of protecting the American resident workers clearly protected under the NLRA.

II. NLRA PROTECTION OF UNDOCUMENTED WORKERS IS ESSENTIAL TO PREVENT THE DETRIMENTAL CHILLING EFFECT ON LABOR ORGANIZING IN ASIAN AMERICAN COMMUNITIES.

Although the total number of Asian undocumented aliens is unknown, at least 9,500 to 16,000 have been apprehended annually by the INS over the past few years. Most Asian undocumented aliens enter the country with valid entry documents but subsequently violate the terms of their visas.[14/]

Many live in densely-populated Asian American communities in urban areas throughout the country. They struggle in low-paying jobs with long working hours, often as garment factory and rest-

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14. See North, Asia-Pacific Illegal Aliens: A Discussion of their Status, Limitations, and Rights Under the Law, Civil Rights Issues, supra note 1, at 238-39.

aurant workers.[15] Fearful of reprisals by their bosses, Asian undocumented workers hesitate to complain about their employers' frequent refusals to pay minimum wage or overtime compensation and avoid participating in organizing efforts to secure better working conditions.[16] Some employers prey

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15. Because of historical patterns of employment discrimination, many Asian Americans have not sought work in the general labor market. Instead, they have been confined primarily to employment in the restaurant, laundry and garment industries. While the number of Chinese laundries has declined significantly in recent years because of competition from large mechanized operations, a majority of Asian immigrants--both legal and undocumented workers--continue to be employed in restaurants and garment factories. T. Sowell, Ethnic America: A History 150 (1981); B. Sung, A Survey of Chinese-American Manpower and Employment 81-83 (1976). A typical Chinese restaurant worker in New York City works over 60 hours a week but earns only $220 per month.

16. See generally Presentation of David North, Director, Center for Labor and Migration Studies, New TransCentury Foundation, Washington, D.C., in Civil Rights

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on their fears, often intimating to discontented workers that they will be deported.[17] Many employers prefer hiring undocumented workers for the very reason that these workers can be controlled and will have nowhere to turn for justice.[18]

In the past two years, the Asian American Legal Defense and Education Fund has been involved in several significant labor events in New York City: the formation of the first independent Asian rest-

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(footnote continued from previous page)
Issues, supra note 1, at 178-83; Presentation of David Ilumin, Director, West Bay Multi-Service Corporation, San Francisco, California, in Civil Rights Issues, id. at 574-84.

17. See Wong, Asian/Pacific American Women: Legal Issues, in Civil Rights Issues, id. at 144.

18. See Buck, The New Sweatshops: A Penny for Your Collar, reprinted in Selected Readings on U.S. Immigration Policy and Law 34 (1980).

aurant workers' union; the successful unionization drives at five Chinese restaurants,[19] a series of minimum wage suits brought against the restaurant owners; and the June 1982 rally of over 15,000 Chinatown garment workers demanding renewal of their International Ladies Garment Workers Union contract.[20] These recent developments signal a rising labor consciousness within the Asian community and a growing willingness among Asian workers to assert their legal rights to decent wages and working conditions.

Exclusion of undocumented aliens from NLRA protection will have a chilling effect

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19. The five restaurants are Silver Palace, Szechuan Taste, Beansprout, Hawaii Kai and Hong Gung Restaurant. In each of these cases, AALDEF either represented individual workers at the union elections or represented the independent restaurant workers' union at contract negotiations.

20. See N.Y. Times, July 16, 1982, at B3, col. 1.

on the growing labor movement in Asian American communities. Due to language and cultural barriers, many Asians, both documented as well as undocumented aliens, lack a fundamental understanding of their legal right to participate in unionization drives or even to demand minimum wage.[21] Moreover, many Asian lawful permanent residents are mistakenly discouraged from exercising their right to organize because of their unfounded fear of jeopardizing their lawful immigration status. Thus, if undocumented workers are stripped of their NLRA protection,

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21 Other factors, most notably the historical discriminatory practices of some unions prevented Asians and other minorities from joining these unions. See United Steelworkers of America, AFL-CIO-CLC v. Weber, 443 U.S. 193, 200, note 1 (1979). Lack of protections of undocumented minority workers under the NLRA could serve to perpetuate the impact of those practices.

both documented and undocumented workers will be even more afraid to speak out against their oppressive working conditions.

Moreover, employers will pit undocumented against documented employees for limited jobs and will utilize such divisions to defeat organizing campaigns in Asian restaurants and garment factories. Therefore, premising labor rights upon an individual's immigration status undermines the right to organize among all employees, regardless of their immigration status.

CONCLUSION

For the reasons set forth above, the judgment of the court below should be affirmed.

Respectfully submitted,

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